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TO: MEMBERS OF THE JUDICIARY COMMITTEE

RE: Raised Bill No. 6487

For well over twenty years, the attorneys at O'Brien, Tanski & Young, LLP have been committed to representing the interests of Connecticut hospitals, Connecticut physicians, and other health care providers that have been sued in medical malpractice cases. Our clients are concerned about the current litigation climate that is causing many to limit their practice to specific procedures and specific locales, others to change their specialties to those considered to be at lower risk for litigation, and still others to abandon clinical practice entirely. Our State has lost and continues to lose too many good physicians and nurses. Those who remain in practice are increasingly disheartened and demoralized. Inevitably, all the citizens of this State will suffer as a result because, sooner or later, we all need good health care, if not for ourselves, then for our children or our aging parents.

With the concerns of our clients and all Connecticut citizens in mind, then, we respectfully request the Committee to consider the following recommendations in its deliberations concerning potential amendments to legislation that goes to the heart of the medical malpractice problems facing our State.

I. BACKGROUND

The Connecticut Legislature first enacted Connecticut General Statutes § 52-190a in 1986 as part of tort reform. The Legislature was responding to a crisis in health care providers' ability to obtain medical malpractice insurance as well their continued ability and willingness to continue practicing in Connecticut.

The purpose of the statute was to benefit health care providers,[i] and prevent frivolous actions by requiring plaintiffs or their counsel to certify that they had a good faith basis for bringing the suit.[ii] To ease the burden on prospective plaintiffs and their counsel, the Legislature provided for an automatic 90-day extension of the statute of limitations to allow plaintiffs and their counsel extra time to conduct the good faith inquiry.

The necessary components of the pre-complaint inquiry and the consequences of failing to comply soon became issues in the superior courts of this state. Because the statute failed to address the consequences of failure to file a certificate of reasonable inquiry, courts held that the only remedy available to defendants for such failure were motions that in effect allowed plaintiffs years of extra opportunities to locate experts who would support their causes of action.[iii] The net effect was that the statute, as interpreted by many trial courts, left defendants with no ability to extricate themselves from cases for which there had been inadequate pre-suit investigation until after years of fruitless and expensive discovery had passed.

After a brief lull following the passage of initial tort reform legislation, medical malpractice insurance premiums in Connecticut began to escalate in the late 1990s and early 2000s.[iv] In 2005, annual rate increases for some health care providers were as great as 90%.[v] These increases consumed financial resources that could have been used for patient care.[vi] In order to reduce their medical malpractice insurance premiums, many physicians, particularly obstetricians, began limiting the scope of their practice.[vii] A number of medical malpractice insurance carriers left the state.[viii] By 2005, there were only three insurance companies writing

physicians and surgeons' medical malpractice liability coverage in Connecticut. A survey conducted by the Connecticut Insurance Department revealed that insurance companies were not interested in writing medical malpractice insurance in Connecticut unless significant tort reform was enacted so that the companies could control their exposures.[ix]

To provide relief to physicians and hospitals from these crushing premiums, the Legislature in 2004 crafted a broad bill (Public Act 04-155) that was vetoed by then Governor Rowland because it did not include a cap on non-economic damages.

Due to the urgent nature of the problem, the General Assembly returned to the problem in the next session. The act that eventually was passed and signed by Governor Rell was Public Act 05-275, "An Act Concerning Medical Malpractice."

The 2005 statute strengthened the good faith statute in three significant ways: (1) it required that the attorney filing suit to attach to the certificate of merit the written opinion of an expert in the field; (2) it required that the expert offering the opinion to be a "similar health care provider" to the defendants and to provide a "detailed basis for the formation" of the opinion that there "appeared to be evidence of medical negligence," and (3) it mandated dismissal if a plaintiff failed to obtain the required written opinion prior to filing suit. To accommodate plaintiffs' concerns that they would be unable to find experts who were willing to publicize their criticisms, the amendment also permitted plaintiffs' attorneys to redact the identity of the expert who supplied the pre-suit written opinion.

Passage of the new bill has been salutary. Because the language of the statute is explicit, Superior Courts have enforced it, and the Supreme Court and Appellate Court has upheld those decisions. The result is that many non-meritorious actions have been prevented or ended before they could result in years of litigation. One example, is the Supreme Court's recent decision in Plante v. Charlotte Hungerford Hospital, 300 Conn. 33 (2011), in which the plaintiff's attorney sued a hospital, a psychiatrist, a licensed crisis worker, and two emergency medicine physicians,

claiming that they provided negligent care to a patient with mental illness. The "expert" on whom the attorney relied to support the suit was a retired nurse and former client of the attorney. She had worked for twenty-two years in a nursing home and had no experience treating the mentally ill. The Supreme Court agreed with the trial court that the attorney's conduct was "blatant and egregious."

Now that the Appellate Court and the Supreme Court are enforcing the language of the good faith statute as the General Assembly intended, some members of the plaintiffs' bar attempting to undo these salutary effects by drastically altering the statutory scheme applicable to medical malpractice actions. The legislature should resist this effort and prevent return to the climate of crisis that gave rise to need for the original legislation.

II. THE PROPOSED AMENDMENTS WOULD VITIATE THE LAW

Last year the Connecticut Trial Lawyer's Association (CTLA) wrote in favor of HB 5537, which is identical to Raised Bill 6487. The CTLA claimed that the HB 5537 was needed to overturn the Appellate Court's decision in Bennett v. New Milford Hospital, Inc., 117 Conn.App. 535 (2009), which held that the plaintiff failed to obtain an opinion from a "similar health care provider" prior to filing suit and, therefore, affirmed the dismissal of the action. The plaintiff in Bennett had claimed that an emergency medicine physician was negligent, but the obtained an opinion from a general surgeon. Because the plaintiff's expert was not in the same specialty as the defendant, i.e., an emergency medicine physician, the Appellate Court ruled that the suit was properly dismissed. The CTLA argued that, as a result of the Bennett decision, meritorious cases will be dismissed and plaintiffs will not have their day in court.

The Supreme Court's decision in Bennett v. New Milford Hosp., Inc., 300 Conn. 1 (2011), establishes that the CTLA's fears were unfounded. The Supreme Court in Bennett has now made it clear that it is ***IMPOSSIBLE*** for a plaintiff, who has a meritorious case, to be

deprived of his/her day in court because a plaintiff can re-file the same lawsuit pursuant to Connecticut's "Accidental Failure of Suit" statute.

The Supreme Court in Bennett agreed with the Appellate Court that a medical malpractice lawsuit must be dismissed when a plaintiff fails to obtain an opinion from a similar health care provider, reasoning that the "similar health care provider" requirement "***best effectuates*** the purpose of § 52-190a...." Id. at 17 (emphasis added). The court explained that "§ 52-190a establishes objective criteria, not subject to the exercise of discretion, ***making the prelitigation requirements more definitive and uniform*** and, therefore, not as dependent on an attorney or self-represented party's subjective assessment of an expert's opinion and qualifications." Id. at 21 (emphasis added). Although dismissal is mandatory, the Supreme Court established that the dismissal is "without prejudice" so that the lawsuit can be re-filed. Specifically, the Court explained:

> [W]e emphasize that, given the purpose of § 52-190a, which is to screen out frivolous medical malpractice actions, ***plaintiffs are not without recourse*** when facing dismissal occasioned by an otherwise minor procedural lapse, like that in this case. First, the legislature envisioned the dismissal as being without prejudice ... and ***even if the statute of limitations has run, relief may well be available under the accidental failure of suit statute***, General Statutes § 52-592. For additional discussion of this particular relief, see the discussion in the companion case also released today, Plante v. Charlotte Hungerford Hospital, 300 Conn. 33, A.3d (2011).

Id. at 31 (emphasis added).

In Plante, the Supreme Court held that a plaintiff may re-file a medical malpractice lawsuit under the Accidental Failure of Suit "when the trial court finds as a matter of fact that the failure in the first action to provide an opinion letter that satisfies § 52-190a (a) was the result of mistake, inadvertence or excusable neglect, rather than egregious conduct or gross negligence on the part of the plaintiff or his attorney." Plante, 300 Conn. at 56.

The requirements of § 52-190 are modest, particularly when compared with protections afforded health care providers in other states. For example, the Connecticut Supreme Court has

held that § 52-190a does ***not*** require that a plaintiff obtain a written expert opinion that the alleged negligence actually caused a plaintiff injury.[x] Instead, all the good faith statute requires is what one would expect of any diligent lawyer who contemplates filing a lawsuit that alleges professional negligence: consultation with an expert who by definition is qualified to opine about breach of the applicable standard of care in order to verify that a good faith basis for suit indeed exists. Moreover, dismissal is without prejudice. A plaintiff can re-file the same lawsuit that complies with § 52-190a.

It is noteworthy that § 52-190a does not require the author of the written opinion to express an opinion to a "reasonable degree of medical probability" that a defendant was negligent. "Reasonable medical probability" is the standard that must be satisfied at trial. Because the required good faith inquiry is a pre-suit endeavor, the General Assembly instead adopted a much more modest standard, requiring the expert only to opine that there "appears to be evidence of medical negligence."

Moreover, in light of the statute's purpose, the statutory requirement that the author of a written opinion be a similar health care provider as defined under § 52-184c is only logical. For example, if a lawsuit names as defendants a psychiatrist and a surgeon, it makes eminent sense that an expert psychiatrist whose opinion is offered in support of the good faith basis for suit would not be allowed to offer opinions about the defendant surgeon's breach of the standard of care, but only be allowed to offer opinions about the defendant psychiatrist. In that regard, for purposes of the good faith pre-suit written opinion, the statute defines a "similar health care provider" by the wholly objective standards found in subsections (b) and (c) of § 52-184c.[xi] Thus, § 52-190a does not require plaintiff's counsel to determine whether a particular expert author would be qualified to testify at trial as to a particular defendant -- an inquiry that can be subjective and a judgment call of a neutral judge. Instead, the General Assembly quite logically and rightly enacted a wholly objective, bright-line definition of "similar health care provider" to

benefit both plaintiffs and health care provider defendants: putative plaintiffs know what specialists they must consult to validate their good faith bases for suit, and defendants know that at least one expert who has expertise in their same area of practice believes that there is evidence of possible negligence.

Similarly, the requirement that the author of the written opinion include a detailed basis for the formation of the opinion is not onerous. Nor is obtaining a written opinion from a "similar health care provider" under the objective definitions of subsections (b) and (c) of § 52-184c. Instead, the written opinion assures that the plaintiff filing suit has not done so because of some misunderstanding of the expert's opinion. Provision of the written opinion (and its attachment to the initial suit papers) also serves to protect the plaintiff from subsequent allegations that the suit was non-meritorious. At the same time, the written opinion affords the defendant(s) notice of areas of concern as well as notice that at least one peer questions the quality of the professional care that was rendered.

III. THE CURRENT STATUTE IS FULFILLING ITS PURPOSE

The statutory requirement that a plaintiff obtain, prior to commencement of an action, a written expert opinion from a similar health care provider has reaped benefits for Connecticut health care providers who otherwise would have had endure the trials and tribulations of the litigation process in inadequately investigated cases. If Raised Bill 6487 is passed, it will eliminate the beneficial effects of the 2005 amendments to the good faith statute and return Connecticut health care providers to the mercy of lawyers and parties who fail to properly investigate lawsuits before filing them. Moreover, Connecticut health care providers will be doubly wronged, because the Raised Bill leaves intact the benefits to plaintiffs that were traded in return for the statute's extra burdens -- statutory caps on jury verdicts and extension of statutes of limitation and repose to allow extra time for pre-suit investigations.

The public will be wronged as well, because it is the public that ultimately will suffer when scarce health care resources are squandered to restore a status quo that benefits no one except some lawyers who fail to fulfill their ethical responsibilities to their clients and properly investigate suits before filing them.

IV. THE CONNECTICUT MEDICAL MALPRACTICE ANNUAL REPORT SHOWS THAT GENERAL STATUTES § 52-190a IS NEEEDED TO REDUCE COSTS INCURRED IN DEFENDING FRIVILOUS LAWSUITS

As part of Tort Reform in 2005, the General Assembly passed General Statutes § 38a-395 that requires the Connecticut Insurance Department to issue annual reports summarizing data that it receives from malpractice insurance companies and self-insured entities. In the Department's May of 2010 report, the Department notes:

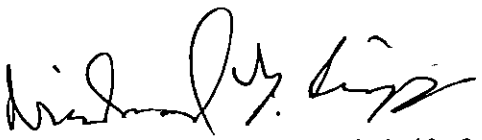
> **Defense Counsel Payments:** Over half of the claims closed with no payments to claimants, yet 79%, or 2,242, generated legal expenses to defend the claim. These expenses totaled $125.1 million, an average of $55,810 per claim. Of these, 50% (1,119) were for incidents that had no payments to claimants, averaging $40,267 for legal expenses. Legal defense costs continued to rise year over year with a significant increase from an average of approximately $58,000 last year to $70,000 in 2009.

Thus, an enormous amount of money is spent defending lawsuits (over 50%) that have no merit. Now that the Supreme Court has ruled that a plaintiff must obtain a written opinion from a "similar health care provider" before filing suit, these costs will finally go down.

V. CONCLUSION

The good work achieved by the Legislature in 2005 should be continued -- not undone. We respectfully submit that the recommendations set forth herein are appropriate and necessary in order to prevent recreation of the malpractice crisis that caused havoc in the past and that will cause havoc again. The narrow interests of a few members of the plaintiffs' bar should not be allowed to override the public's interest in the delivery of health care by providers whose time and efforts are best devoted to their patients -- not to the defense of non-meritorious law suits.

Very truly yours,



Michael G. Rigg, Esq., on behalf of
The Lawyers at O'Brien, Tanski & Young, LLP

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[i] *Barrett v. Montesano*, 269 Conn. 787, 796 (2004).

[ii] *Bruttomesso v. Northeastern Connecticut Sexual Assault Crisis Services, Inc.*, 242 Conn. 1, 15 (1997).

[iii] *LeConche v. Elligers*, 215 Conn. 701 (1990).

[iv] Milford Hospital's insurance premium increased by 480% from 2001. Medical Malpractice and Miscellaneous Bills Before the Judiciary Committee, 2005 Judiciary (April 8, 2005) [hereinafter Judiciary Hearing] (statement of Richard Pugh). Griffin Hospital's premium doubled from 2001 to 2005. Id. at 301-302 (statement of Patrick Charmel, President and CEO of Griffin Hospital). See also, Id. at 195-196 (statement of Steven O'Brien, M.D.) (200% increase from 2001 to 2004); Id., at 206-207 (statement of Fitzhugh Pannill, M.D.) (increase from $3,400 in 1997 to $20,000 in 2002); Id. at 314 (statement of Vincent Pepe, M.D.) (30 to 40% of gross receipts was expended paying his professional liability premium); Id., at 322 (statement of Larry Lazor, M.D.) (increase from $40,000 for coverage of $7 million in 1995 to $120,000 for coverage of only $2 million per case in 2005); Id., at 329 (statement of Malcolm Brown, M.D.) (rates increase from $17,000 to $55,000 in 4 years); Medical Malpractice before the Insurance and Real Estate Committee, 2005 Insurance and Real Estate Committee 136 (Feb. 10, 2005) [hereinafter Insurance Hearing] (statement of Ayaz Madraswalla, M.D., President-Elect of the Connecticut Academy of Family Physicians) (premiums for family physicians had increased 20% to 30% each year over the previous four years).

[v] A rate increase of 89% submitted by one of the insurance carriers in the state was reviewed by the actuarial staff of the Insurance Department and was found not to be excessive. *Insurance Hearing, supra* n. 6, at 9 (statement of Susan Cogswell, Commissioner, State Insurance Department). *See also, Judiciary Hearing, supra* n. 6, at 118 (statement of Denise Funk, CEO of Connecticut Medical Insurance Company) (CMIC requested a 14% increase); Id., at 253 (statement of MaryAnn McDonnell, M.D.) (insurance company proposed a 90% increase in her group's rates).

[vi] Patrick Charmel, President and CEO of Griffin Hospital, testified that the hospital's premium increase since 2001 was "equivalent to half of the hospital's annual drug budget. It would pay for the entire cost of the hospital-wide picture archive and computer system to digitize, display, store and retrieve diagnostic radiology images. ... It would cover the investment required to convert to an electrical medical record [system] ... It could equip three operating rooms with state-of-the-art laparoscopic video surgery and patient-monitoring equipment...[T]he $1 million could have been used to hire 15 additional registered nurses to provide a higher level of patient care and to provide a better working environment for our nurses, who shoulder an ever-increasing burden." *Judiciary Hearing, supra* n. 6, at 302-303.

[vii] Milford Hospital lost 20% of its obstetrical staff. *Judiciary Hearing, supra* n. 6, at 224 (statement of Richard Pugh). In Greenwich, two obstetric practices merged so that three of the physicians could drop obstetrics. Id., at 252 (statement of Maryann McDonnell, Chairwoman of the Connecticut Section of the American College of Obstetrics and Gynecology). Marc Storch, M.D., a Westport obstetrician stopped delivering babies, and his premiums dropped from $150,000 per year to $17,000. Id. at 263 (statement of Marc Storch, M.D.). Grove Hill Medical Center lost three vascular surgeons and an obstetrician because of the premiums. *Insurance Hearing, supra* n. 6, at 158 (statement of Kirsten Anderson, M.D., Medical Director).

[viii] *See, Insurance Hearing, supra* n. 6, 154 (statement of Martin Ross, M.D.) (changed insurance carriers twice because his carriers stopped writing insurance in Connecticut).

[ix] *Insurance Hearing, supra* n. 6, at 2-4 (testimony of Susan Cogswell, Commissioner, Connecticut Insurance Department); *Judiciary Hearing, supra* n. 3, at 7-8 (testimony of Susan Cogswell).

[x] *Dias v. Grady*, 292 Conn. 350 (2009).

[xi] *Dias v. Grady*, 292 Conn. 350 (2009) (§ 52-190a compelled that, as to a particular defendant, the author of the written opinion had to be a § 52-184c similar health care provider, who, by definition, would be qualified to testify to the rigors of the applicable standard and its breach, but who might very well not be qualified to express a causation opinion).